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Supreme Court, U.S.
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In the

Supreme Court of the United States

UNTIED STATES OF AMERICA,

Respondent,

-against-

FREDDY ABAD,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant's Sixth Amendment right to a speedy trial can be held hostage to the Justice Department's glacial pace in deciding death penalty applications?

2. Whether the Second Circuit Court of Appeals misconstrued the examples of "prejudice" set forth in Barker v. Wingo as being required elements of any constitutional speedy trial claim?

3. Whether defense counsels' failure to move to dismiss the indictment on speedy trial grounds, or to properly object to the introduction of an overwhelming amount of other-crimes evidence, or to develop and present any credible theory of defense, or to investigate exculpatory evidence turned over by the government, denied Freddy Abad his Sixth Amendment right to the effective assistance of counsel?

4. Whether a conviction for murder in aid of racketeering can stand where the murder was committed out of personal animus and where there was insufficient evidence of any enterprise?

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In the
Supreme Court of the United States
October Term, 2008

FREDDY ABAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

OPINION BELOW

The opinion of the Court of Appeals below is reproduced in the appendix to this petition and is reported at United States v. Abad, 514 F.3d 271 (2d Cir. 2008). (App. 1a). The Court denied Abad's petition for rehearing *en banc* on March 24, 2008. (App. 14a).

JURISDICTION

Judgment of the Court of Appeals for the Second Circuit was entered on January 30, 2008, and rehearing was denied on March 24, 2008. The jurisdiction of this Court to review this case by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The following constitutional provisions are involved in this petition:

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ..."

"In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defence."

STATEMENT OF THE CASE

Freddy Abad was indicted on August 27, 2001 and charged in a sealed indictment, together with co-defendants Hector Ortiz and "John Doe # 1", with murder in aid of racketeering and other crimes in relation to the September 1996 shooting death of Hilario DeJesus, a drug dealer. The indictment alleged that Abad was the leader of a group of armed robbers (dubbed the "Andrews Avenue Enterprise"), who targeted drug dealers in the New York metropolitan area between 1993 and 1996. The government's evidence showed that in the summer of 1996, Abad and Hector Ortiz robbed DeJesus at gunpoint. DeJesus retaliated by later forcing Abad into a car and threatening to use a "sawing machine" on him. The abduction ended when Abad jumped from the moving vehicle. On September 7, 1996, Abad responded by forcing his way (with three accomplices) into DeJesus's apartment and shooting him with a TECH-9 automatic weapon.

Almost five years later, on April 12, 2002, Abad was arrested in Gastonia, North Carolina at a home he shared with the mother of his three children. On May 9, 2002, he made his first appearance in the Southern District of New York, and was arraigned and entered a plea of not guilty. On November 27, 2002, defense counsel wrote to the

Court and the government stating that "Abad wishes ... the earliest possible trial date" and further advising that hereafter, defense counsel was "not authorized to consent to exclusions of time".

Co-defendant Hector Ortiz was arrested in Miami, Florida on November 6, 2003. He began cooperating almost immediately and had the first of fifteen proffer sessions with a New York federal prosecutor on November 25, 2003. Ortiz was arraigned and entered a plea of not guilty to the indictment on January 7, 2004.

The case was initially classified as death penalty eligible, and whether such a penalty would be sought for Abad was under consideration by the Department of Justice for eighteen months. On October 15, 2003, Abad was notified that the government would not be seeking the death penalty. Weeks later, however, co-defendant Ortiz was arrested, and the government was successful in postponing Abad's trial for eleven months (from January to November 2004) while the Justice Department considered whether to seek the death penalty against Ortiz. On June 11, 2004, Abad's counsel again wrote to the Court and stated that defendant was "acutely concerned that his case be tried at the earliest possible opportunity."

On November 23, 2004, co-defendant Ortiz signed a formal cooperation agreement (dated November 4, 2004), waived indictment, and pleaded guilty to a seven count information charging him with, *inter alia*, murder in aid of racketeering and racketeering, with 75 robberies and kidnappings and

narcotics trafficking (over 200 kilograms of cocaine and over 3 kilograms of heroin) as predicate acts.

Six days after Ortiz signed his cooperation agreement and pleaded guilty, and two years and eight months after petitioner's arrest in April 2002, Abad's trial finally commenced before a district judge and jury on November 29, 2004.

To prove its case, the government called as principal witnesses relatives of victim Hilario DeJesus, who were eyewitnesses to his murder (none of whom identified Abad), cooperating witnesses including co-defendant Hector Ortiz, and law enforcement officers who presented an abundance of uncharged and other crimes evidence, as well as ballistics and other expert evidence.

The defense rested without calling a single witness or introducing a single document into evidence. The lack of a defense case was a matter of choice, not necessity, since the record disclosed matters which should have been brought before the jury. For example, trial counsel advised the district court that testing of Abad in connection with the death penalty application revealed that he was "borderline retarded" and had "an I.Q. of 59". Expert scientific evidence concerning that mental deficiency should have been offered by the defense to counter the government's claim that Abad "was the leader ... [of a gang of] professional armed robbers", that acted "deliberately, carefully, with discipline".

Additionally, since virtually every bad act that Freddy Abad ever committed in his life was introduced by the government during its case-in-chief, there was no reason why defense counsel could

not have introduced evidence of Abad's religious conversion and law-abiding conduct after he got out of jail in June 1998. Such character evidence would have been corroborated by the testimony of one of the cooperating witnesses (Flora Salas), and would have provided a favorable and stark contrast with the government's cooperating witnesses, who committed violent crimes all through the post-1998 period up to one month before trial commenced in November 2004.

The absence of a defense case was foreshadowed by trial counsel's three or four minute opening statement. Counsel argued that Abad was the victim of misidentification, and also claimed that he was a "schnook" who was taken advantage of by the cooperating witnesses. Unfortunately for Abad, those arguments were recanted by trial counsel in summation when he made the following concessions:

> You know, I have to apologize to you for something. When we first started, I got up and said to you, He is a schnook, that he is a schnook in a suit.
>
> Well, he has been in the same suit just about every day; he is not the same schnook.
>
> The worst thing that a lawyer can do is to lose credibility with a jury by suggesting something that is not accurate. When I got up and said he was a schnook, I was off. I didn't have a chance to read their witnesses, speak with their witnesses, debrief them 15 or 20 times like they did.

> It is obvious. It is painfully obvious that he [defendant] was involved in some very bad things in the '90s. He was arrested a number of times. Every one of those cases in connection with this stuff was dismissed. But he is no schnook.
>
> You heard about homicides, Rafaelito's homicide, the bodega worker, Al-Fallahy's homicide, kidnappings - none of those things are for this jury to decide. I leave it to you. This jury has to decide one issue, September 7 of 1996: Is he the man?
>
> If you believe he is the shooter [of Hilerio DeJesus], he is guilty of the whole damn thing.

That concession and recantation was, of course, highlighted to the jury by the prosecutor in rebuttal.

In addition to the flawed opening and closing statements, trial counsel offered only token resistance to the government's massive offer of other crimes evidence. Three weeks before Abad's trial finally began, the government submitted a twenty page letter notifying the Court and defense counsel of its intention to offer evidence at trial of crimes committed by defendant and his alleged co-racketeers. The government sought to introduce detailed evidence concerning the following specific, uncharged crimes: two murders, one robbery, four attempted robberies, one kidnapping, three instances of gun possession, and several instances of narcotics trafficking. In addition to that evidence, the government also wished to present summary

testimony of more than twenty robberies and burglaries allegedly committed by the Andrews Avenue Enterprise. In its letter, the government argued that all the uncharged crimes evidence was admissible as proof of the racketeering enterprise, as background to the charged crimes, because it was Giglio material for the cooperating witnesses, and admissible, in any event, under Fed.R.Evid 404(b).

Defense counsel submitted a letter to the Court and the government objecting generally to the uncharged crimes evidence as being unduly prejudicial under Rule 404(b). Remarkably, counsel wrote that he had no objection to four specific crimes (including the pre-indictment attempted robbery in Palisades Park, New Jersey and the 1993 arrest for robbery and possession of a Tech-9), and argued only against the admission of a pre-indictment, youthful offender adjudication in 1989 arising out of an assault and weapons charge.

At the final pretrial conference on November 24, 2004, the district court ruled that evidence relating to the 1989 youthful offender case was inadmissible, but that all the other evidence of uncharged crimes was admissible as proof of the racketeering enterprise.

On December 15, 2004, the jury found Abad guilty on all counts. On March 10, 2005, Abad filed a pro se motion to vacate his conviction, alleging a violation of his speedy trial rights. After briefing by newly-appointed defense counsel and the government, the motion was denied by the trial court. United States v. Abad, 2005 U.S. Dist. LEXIS

32031, 2005 WL 3358480 (S.D.N.Y. December 7, 2005).

On January 18, 2006, Abad was sentenced to life imprisonment plus 30 years. Co-defendant Hector Ortiz was sentenced on July 20, 2006 to five years and one day imprisonment and three years supervised release.

Following the imposition of sentence, petitioner appealed. In a decision rendered on January 30, 2008, the Court of Appeals affirmed the conviction. The Second Circuit held that Abad's Sixth Amendment right to a speedy trial was not violated since there were "valid reasons" for the lengthy delay and petitioner could point to no "prejudice ... of the sort ... contemplated by Barker's fourth factor." Abad, 514 F.3d at 275. The Court of Appeals also held that petitioner had waived his statutory speedy trial claim since his attorney had failed to make a timely, pretrial Speedy Trial Act motion, and the Court refused to review the claim under the plain error standard of review, overruling United States v. Sorrentino, 72 F.3d 294 (2d Cir. 1995). Finally, the Court of Appeals rejected Abad's ineffective assistance of counsel claim, holding that, on balance, trial counsel's performance was adequate and that, "given the strength of the government's case, Abad cannot show that he was prejudiced by his counsel's performence." Abad, 514 F.3d at 276. Petitioner sought rehearing, with a suggestion of rehearing en banc. The Court denied the petition without opinion. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

Introduction

Freddy Abad spent thirty-two months in jail awaiting the commencement of his trial. For much of that time, he was facing the prospect of execution. On several occasions, he directly advised the district court that he wanted a speedy trial. He even prohibited his attorney from consenting to any exclusions of time for speedy trial purposes. A speedy trial was not, however, forthcoming and because of that, Abad's rights under the Speedy Trial Clause of the Sixth Amendment of the United States Constitution were violated. The facts reveal that Abad did not personally consent to the vast majority of the exclusions of time, and that the institutional delays resulting from the Justice Department death penalty process should have been chargable to the government since it has the responsibility of bringing a defendant to trial.

In addition to being deprived of his right to a speedy trial, petitioner Abad received less than the constitutionally-mandated effective assistance of counsel. Trial counsel's woeful performance was "highlighted" by the total absence of any coherent theory of a defense, by opening and closing statements which invited the jury to convict his client (which they quickly obliged), and by the failure to pursue exculpatory evidence turned over by the government.

1. *Taking Twenty-Nine Months to Decide Two Death Penalty Applications Is Not A "Valid Reason" to Delay Trial for an Incarcerated Defendant*

The Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const., amendment VI. The right to a speedy trial, which can be traced back to the Magna Carta and the founding of the United States, Klopfer v. North Carolina, 386 U.S. 213, 225 (1967) (noting that the "history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."), is "as fundamental as any of the rights secured by the Sixth Amendment." Barker v. Wingo, 407 U.S. 514, 516, n. 2 (1972) (*quoting* Klopfer, 386 U.S. at 223). *See also* Moore v. Arizona, 414 U.S. 25, 26 (1972) (noting that the right to a speedy trial is "a fundamental right of the accused . . . specifically affirmed in the Constitution.") (*quoting* Barker, 407 U.S. at 533); Dickey v. Florida, 398 U.S. 30, 37 (1970) ("The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed.").

This Court has identified four factors which must be weighed in considering whether a defendant's constitutional right to a speedy trial has been violated: 1) length of the delay; 2) reason for the delay; 3) whether and how the defendant asserted the speedy trial right; and 4) prejudice to the defendant. Barker, 407 U.S. at 530.

With respect to Abad's Sixth Amendment speedy trial claim, consideration of the four factors outlined in Barker makes it clear that there was a constitutional violation. Regarding length of the delay, a post-accusation delay approaching one year is presumptively sufficient to trigger a speedy trial analysis (Doggett v. United States, 506 U.S. 647, 652 n.1 (1992)), and the nearly three year pretrial delay in this case was presumptively prejudicial. The Court of Appeals agreed that this factor "militates in favor of Abad." Abad, 514 F.3d at 274.

The second factor – the reason for the delay – should also weigh heavily against the government. The district court found that "the delay in this case ... was primarily due to the need for the Department of Justice to separately decide whether to pursue the death penalty against both the defendant and his co-defendant". Without citing a single case, the Court of Appeals opined that it was permissible for the Justice Department to delay an incarcerated defendant's trial for almost three years while it decided whether to seek the death penalty for him and then a co-defendant, soon-to-be cooperating witness. Abad, 514 F.3d at 274-75.

Why did it take a year and one-half for the Justice Department to decide whether to seek the death penalty against Abad, especially since this Court decided, in June 2002 (two months after Abad's arrest), that a person with an I.Q. of 59 was mentally retarded and could not be executed. Atkins v. Virginia, 536 U.S. 304 (2002). Why did it take an additional ten months to decide whether to seek the death penalty against co-defendant Ortiz? And was

it a coincidence that the death penalty determination as to Ortiz was made in early November, 2004, that he signed a cooperation agreement on November 23, 2004, and that Abad's long-delayed trial started the next day with jury selection? Those facts are more suggestive of a prosecutor's manipulation of the death penalty process than they are of a valid reason to deprive a defendant of a fundamental constitutional right. Yet the panel below answered none of those questions. Looked at another way, if a defendant asked a court to delay his trial for three years, he'd be laughed out of court. It should be no different for the prosecution. Such a *laissez-faire* approach to trial scheduling is inconsistent with the oft-expressed view of this Court that the right to a speedy trial is as "fundamental as any of the rights secured by the Sixth Amendment." Klopfer, 386 U.S. at 223.

Even if death penalty review were all the government was doing during that three year period, the delay would be unacceptable. *See* United States v. Roberts, 515 F.2d 642, 646 (2d Cir. 1975) (holding that "institutional delays are chargeable to the government"); United States v. Jackson, 2006 U.S. Dist. LEXIS 3901, 2006 WL 238991 (S.D.N.Y., January 31, 2006) (holding that lengthy trial delay to allow government to conduct death penalty review was unacceptable).

But, as we have seen, that's not all the government was doing. During that period, the government explored a cooperation agreement with co-defendant Ortiz. Ortiz had signaled his desire to plead guilty and cooperate immediately after his arrest in November 2003. Yet the government took a

full year to debrief Ortiz and negotiate the terms of his plea and cooperation agreements. Also during that time, the government was able to obtain the services, as cooperating witnesses, of co-conspirators Flora Salas and Jesus Salvadore Mercedes Gonzalez. Without the testimony of Ortiz, Salas and Gonzalez, Abad's trial would unquestionably have taken on a completely different character.

The third factor – Abad's assertion of right to speedy trial – again should weigh heavily in his favor. In November 2002, defense counsel advised the Court in writing that defendant "wishes ... the earliest possible trial date" and that counsel was "not authorized to consent to exclusion of time". In June 2004, defense counsel advised the Court in writing that defendant was "acutely concerned that his case be tried at the earliest possible opportunity." Moreover, once trial counsel was discharged Abad promptly filed his *pro se* motion asserting that his speedy trial rights had been violated.

The Court of Appeals' view, that petitioner asserted his demand for a speedy trial "opportunistically" (Abad, 514 F.3d at 275), unfairly minimizes his attempts to get an early trial and wrongly shifts the burden onto him. A "defendant has no duty to bring himself to trial, the [government] has that duty as well as the duty of insuring that the trial is consistent with due process." Barker, 407 U.S. at 527. Thus, the government, not Abad, was responsible for bringing Abad to trial and complying with the constitutional speedy trial obligations. "Although a great many accused persons seek to put off the confrontation as

long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." Dickey, 398 U.S. at 37-38. The Court continued:

> This is brought sharply into focus when, as here, the accused presses for an early confrontation with his accusers and with the [government]. Crowded dockets, the lack of judges or lawyers, and other factors no doubt make some delays inevitable. Here, however, no valid reason for the delay existed; it was exclusively for the convenience of the [government]. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law.

Id. *See also* Doggett, 505 U.S. at 657 (holding that "negligence" is an "unacceptable" reason for delaying a criminal prosecution); Strunk v. United States, 412 U.S. 434, 436 (1973) (holding that a lack of personnel in the United States Attorney's Office to be an invalid justification for delays in commencing trial). And while the district court found that the "defendant has not shown that these delays resulted from the government's negligence or bad faith", no inquiry or hearing was ever conducted to support that finding. Consequently, the record is unclear as to whether there was a "deliberate attempt to delay the trial in order to hamper the defense". Barker, 407 U.S. at 531.

2. *The Second Circuit Court of Appeals Misconstrued The Examples of "Prejudice" Set Forth in Barker v. Wingo As Being Required Elements of Any Speedy Trial Claim, in Contrast to a Holding of the Ninth Circuit*

The fourth factor to be considered in assessing a constitutional speedy trial claim is the prejudice flowing from the delay. This factor is viewed with an eye to the interests which the right to speedy trial is designed to preserve. Barker, 407 U.S. at 532. The Barker Court identified three such interests: 1) prevention of oppressive pretrial incarceration; 2) avoidance of undue worry and anxiety by the accused; and 3) limitation of the possibility that the defense will be impaired by the passage of time. *Id.* Abad's nearly three year pretrial incarceration surely qualifies as "oppressive" and anxiety-inducing within the meaning of Barker. Further, this Court has recognized that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Doggett, 505 U.S. at 655-56.

Finally, as previously stated, Abad can point to key prosecution witnesses that would not have been available to the government but for the excessive pretrial delay. *See* United States v. Hall, 181 F.3d 1057 (9th Cir. 1999) (inexcludable delays occasioned by government's plea negotiations with co-defendant prejudiced defendant and impaired his defense at trial).

As an example of the prejudice he suffered by the almost-three-year pretrial delay, Abad can point

to the fact that his trial was delayed for one year while the government debriefed and negotiated a cooperation agreement with co-defendant Hector Ortiz. Those negotiations culminated in Ortiz pleading guilty just five days before Abad's trial commenced, and Ortiz's appearance as the star prosecution witness at that trial.

The court below flatly rejected that claim of prejudice ("... Abad points to no prejudice" [514 F.3d at 275]), reasoning that:

> [A] delay allow[ing] the government to locate certain "key prosecution witnesses" ... is not the sort of prejudice contemplated by Barker's fourth factor. That prejudice is concerned with impediments to the ability of the defense to make its own case (e.g., if defense witnesses are made unavailable due to the government's delay); the opportunity for the prosecution to prepare for trial does not, on its own, amount to prejudice to the defense. *See* Barker, 407 U.S. at 532 (considering, as one of several kinds of possible prejudice to the defense, "the inability of a defendant adequately to prepare his case" that might arise "[i]f witnesses die or disappear during a delay," or "if defense witnesses are unable to recall accurately events of the distant past").

514 F.3d at 275. Holding that prejudice can arise only from harm to a defendant's case, and not from any bolstering of the government's case, is contrary

to the holding of the Ninth Circuit in Hall. 181 F.3d at 1062-63 (defendant "was effectively prevented from going to trial until the government had secured [co-defendant] as a witness against him. Seen in this light, the delay prejudiced Hall in the sense that it 'impaired [his] defense at trial.' [United States v. Darby, 744 F.2d [1508,] 1519 [11th Cir. 1984]]").

The decision of the panel below also misconstrued the Barker opinion with respect to the meaning and scope of "prejudice". While the examples of prejudice are accurately recited, the Barker Court went to great pains to explain that:

> We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.
> (....)
> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 530, 533 (emphasis added).

Thus, if the Barker Court held that a speedy trial violation could be found with none of the four factors present, it is simply not reasonable to hold,

as the court below did, that the scope of the "prejudice" factor should be limited to the examples cited by the Barker Court. This is especially so since the Supreme Court has held that it is improper for the prosecution intentionally to delay "to gain some tactical advantage over [defendants]". United States v. Marion, 404 U.S. 307, 325 (1971). The protracted delay in this case clearly allowed the government to gain a tactical advantage since it used the time to arrest, debrief, negotiate with, and obtain the services of numerous cooperating witnesses. In a case where the civilian eyewitnesses were unable to identify Abad at trial, this tactical advantage proved decisive.

3. *While the Evidence Against Petitioner Was Legally Sufficient, It Was Not So Overwhelming As to Remove His Constitutional Right to the Effective Assistance of Counsel*

A defendant has a Sixth Amendment right not just to counsel, but to "reasonably effective assistance" of counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984). To gain relief for a violation of this right, a defendant must show both unprofessional conduct and, in most cases, prejudice as a result. In other words, the defendant must show that there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Here, counsels' errors were of such a magnitude that the outcome of the prosecution was unquestionably affected.

Specifically, defense counsel was ineffective in four particular areas: (a) failure to timely move to dismiss on speedy trial grounds; (b) failure to meaningfully contest the introduction of an overwhelming amount of other crimes evidence; (c) the failure to develop and present any credible theory of a defense; and (d) the failure to investigate exculpatory evidence turned over by the government.

a. Speedy Trial

Freddy Abad went to trial almost three years after he was arrested and incarcerated. During that period, he personally made two attempts to get an early trial, and even forbade his lawyer to consent to any exclusions of time. Given the length of the pretrial delay and petitioner's stated desire for a speedy trial, there was simply no excuse for counsel not to make a motion to dismiss on speedy trial grounds. If nothing else, the failure to so move resulted in a waiver of the statutory speedy trial claim. Abad, 514 F.3d at 273-74.

In addition to failing to timely move to dismiss the indictment, the attorney that represented Abad until just before trial disregarded petitioner's explicit instruction not to "consent to the exclusion of time." After that November 27, 2002 letter, defense counsel consented to nine additional exclusions of time. That conduct flies in the face of the obligations that an attorney has to a client:

> It is the "role of the lawyer [to be] professional advisor and advocate," Lefcourt v. United States, 125 F.3d 79, 86 (2d Cir.1997) (*quoting* In re Shargel,

> 742 F.2d 61, 62-63 (2d Cir. 1984)), not to usurp his "client's decisions concerning the objectives of representation," *see* Jones v. Barnes, 463 U.S. 745, 753 n. 6 (1983) (recognizing that, where ethically and legally possible, "'[a] lawyer shall abide by a client's decisions concerning the objectives of representation'") (*quoting* ABA Model Rules of Prof'l Conduct R.1.2(a)); Wallace [v. Davis], 363 F.3d [914,] 920 [7th Cir. 2004] ("By respecting [his client's] wishes, counsel not only abided by ethical requirements (lawyers are agents after all) but also furnished the quality of assistance that the Constitution demands.") (emphasis in original)...

United States v. Wellington, 417 F.3d 284, 289 (2d Cir.), *cert. denied*, 546 U.S. 1049 (2005). Freddy Abad did everything that he could to get a speedy trial; unfortunately, his defense counsel not only did not assist him in that proper objective, they actually worked against him and by so doing, deprived defendant of his Sixth Amendment right to effective assistance of counsel.

b. Token Opposition to Overwhelming Other-Crimes Evidence

Three weeks before trial, the government submitted a twenty page letter notifying the Court and trial counsel of its intention to offer at trial detailed evidence of nine, uncharged criminal

incidents (including murder, robbery and kidnapping), and summary evidence of an additional twenty-plus robberies and burglaries. In the face of this onslaught of highly-damaging material, trial counsel's opposition was tepid, at best. In a brief letter, and later at a pretrial conference, counsel expressed no objection to four of the nine criminal incidents, even though one of the four was a pre-indictment attempted robbery, and a second of the four was a 1993 arrest of defendant for robbery and possession of a Tech-9, the same type of distinctive weapon alleged used to shoot Hilario DeJesus in 1996. Any reasonable criminal defense attorney would have known that the introduction of that other crimes evidence made the chances of success at trial remote, at best. Thus, it was crucial for counsel to try to persuade the district judge that it was not proper enterprise evidence or that it was, in any event, unfairly prejudicial. Counsel made no such effort and a three hour jury deliberation process after a two and one-half week trial was the result.

Rule 403 of the Federal Rules of Evidence provides in relevant part that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...". This Court has stated:

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.

Old Chief v. United States, 519 U.S. 172, 180 (1997). Courts have recognized on countless occasions the devastating effect of the admission of uncharged crimes evidence. *See e.g* United States v. Colon, 880 F.2d 650, 661 (2d Cir. 1989) ("The record leaves no doubt that defense counsel recognized that Colon's case would be badly damaged by admission of the similar acts evidence.") That is why district courts are reminded that they "must exercise great care to ensure that juries are not permitted to conclude that because a defendant has committed a similar crime before, he or she therefore has a criminal propensity sufficient to justify conviction in the case at hand." *Id.* 656.

In the case at bar, the jury was allowed to hear, without objection from defense counsel, that Abad participated in a robbery in 1993, with a Tech-9. They were then called upon to decide whether Abad committed a robbery (and murder) with a Tech-9 in 1996. "Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious..." Old Chief, 519 U.S. at 185. Although counsel did express concern, in passing, about the "cumulative effect" of all the other crimes evidence, he did not ask the Court, as any reasonable attorney should have, to exclude "concededly relevant evidence" on the basis of "unfair prejudice".

c. Lack of a Credible Theory of Defense

As we have described, there was no defense case; indeed, there was virtually no theory of a

defense. In his three to four minute opening statement, trial counsel suggested two "defenses": 1) defendant was a "schnook" taken advantage of by the cooperating government witnesses; and 2) that he was the victim of misidentification.

The first "defense" was flatly recanted by trial counsel in summation where he apologized for misleading the jury. Worse than the apology was the implication that defense counsel had been mislead by his own client and, now at the end of the trial, was persuaded by the prosecution witnesses that Abad had in fact done "some very bad things in the 90s." Counsel then asked the jury to acquit Abad of the "very bad thing" he was charged with doing in 1996. As if that were not damaging enough, defense counsel told the jury in summation:

> If you believe he is the shooter, he is guilty of the whole damn thing.

With that one sentence, the defense attorney effectively negated the presumption of innocence, proof beyond a reasonable doubt and all the other bedrock principles of our criminal justice system. The trial judge did instruct the jury about the elements of all of the crimes; but it didn't matter. Abad's lawyer had told them: "If you believe he is the shooter, he is guilty of the whole damn thing."

During the course of the trial, counsel's lack of a credible theory of defense was well illustrated by his cross-examination of one police officer. NYPD Sergeant McCormack testified that, in June 1994, he observed two male Hispanics hide a gun under the hood of a car. McCormack arrested the two, who gave the names "Luis Fernandez" and "Mortimer

Ruiz". The government suggested on direct examination that Fernandez was Abad. On cross-examination, counsel brought out mistakes in the officer's paperwork and discrepancies in the descriptions. That "good work" was immediately followed by a stipulation recited to the jury by the prosecutor:

> [O]n or about June 7, 1994, Freddy Abad, the defendant, using the name Luis Fernandez, was arrested in Manhattan for criminal possession of a firearm. Thereafter, the charges against Abad were dismissed because the case did not proceed to trial within the specific time frame required by state law. No determination was ever made as to whether Abad was guilty or not guilty of the charges.

It's not everyday that a defense attorney's cross-examination is undercut by his own stipulation, or that a jury is told that a defendant "beat" a previous case on a legal "technicality".

Additionally, trial counsel made no effort to present to the jury the fact that Abad had an I.Q. of 59 and was "borderline retarded". Such evidence could have countered the government's claim that Abad was the leader of a gang of "professional armed robbers" which "acted deliberately, carefully, with discipline", and supported the defense opening statement that defendant was duped by the government witnesses. *See* DeLuca v. Lord, 77 F.3d 578 (2d Cir. 1996) (defense counsel's abandonment of extreme emotional disturbance defense for

inadequate reasons was ineffective assistance of counsel).

d. Failure to Pursue Exculpatory Evidence Turned Over by Government

Finally, in an inexplicable act, defense counsel declined to accept exculpatory evidence proffered by the government:

> PROSECUTOR: This is the witness and her husband talking about this man named Ruben. This is after the period where they were working together to give information about robberies to Hector [Ortiz] and Jose [Abad]. But it is not being offered for its truth. Actually, it's part of the Giglio material.
>
> What's going to be elicited is that Andy [Salas] told Flora [Salas] that this person named Ruben had been arrested about two years after Lalo's [Hilario DeJesus] death with an Uzi [Tech-9], and that Andy thought that the gun had something to do with Lalo's murder.
>
> And this is a conversation with Flora that relates to Hector, on the taped calls that Mr. Rothman has.
>
> DEFENSE COUNSEL: I still don't see what the relevance is that a year later they are talking about someone who got arrested about a gun –

> PROSECUTOR: – I have no problem if Mr. Rothman doesn't ask about it on cross-examination.
>
> DEFENSE COUNSEL: I won't.
>
> PROSECUTOR: Then it's fine.

Remarkably, defense counsel was uninterested in the fact that an individual, by the name of "Ruben", who was associated with several of the co-conspirators, may have been arrested with the murder weapon approximately one year after the death of DeJesus. The failure to investigate that promising lead is "objectively unreasonable", by any standard. Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003).

The collection of errors described above are not reasonable strategic decisions which simply did not work out. They represent, beyond peradventure, unprofessional conduct.

4. *The Evidence was Insufficient to Prove Murder in Aid of Racketeering Because There Was No Proof That the Murder was Committed "For the Purpose Of Gaining Entrance to or Maintaining or Increasing Position in" the Racketeering Enterprise, Or that There Even was Such an Enterprise*

The evidence at trial showed that the murder of Hilario DeJesus was for personal reasons. The personal animosity arose from the attempt by Hilario DeJesus to kidnap and murder Abad. Furthermore, the so-called "enterprise" was, in fact, a random collection of mercenaries, consisting of those who happened to be "around" whenever a "job"

arose. Thus, because there was no enterprise for Abad to gain entrance to, or maintain or increase his position in, the question here is not whether Abad participated in DeJesus's murder, but whether there was sufficient evidence to invoke federal jurisdiction over that murder under 18 U.S.C. § 1959. Here, no reasonable view of the evidence supported the government's theory of murder in aid of racketeering. Therefore, Abad's conviction on this count must be reversed.

First, the government failed to prove that an actual "enterprise" existed. In United States v. Turkette, 452 U.S. 576 (1981), this Court defined an association-in-fact enterprise as:

> an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. ... The [enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.

Id. 583. In determining the extent to which the defendant's association with others arising from the joint commission of racketeering acts can be construed as an association-in-fact enterprise, the enterprise must have an "organization with a structure and goal separate from the predicate acts themselves[.]" *Id.* Consequently, an enterprise is defined as "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." United States v.

Torres, 191 F.3d 799, 805 (7th Cir. 1999). *See also* United States v. Korando, 29 F.3d 1114, 117 (7th Cir.), *cert. denied*, 513 U.S. 993 (1994) ("The hallmark of an enterprise is structure."). Other than the government's hand-picked name assigned to the alleged "Andrews Avenue Enterprise", the record is devoid of any showing that such an enterprise actually existed; or, for that matter, that Abad was a member, let alone leader, of said enterprise. To the contrary, the evidence indicated that an ever-changing group of young criminals, over a period of years, would look for "jobs," or opportunities to rob and steal. Logically, the targets of these jobs were generally criminals; specifically, drug dealers, as co-conspirators Vargas and Ortiz testified.

Thus, while the targets were static, the participants and methods were not. In fact, the government's most important witnesses all testified that they committed various crimes, including robbery, assault and murder, without Abad's participation, approval or knowledge. Thus, it defies logic to conclude that Abad sought to maintain or increase his position in an enterprise with which he often had no interaction, including zero interaction with Salas or Ortiz after the DeJesus murder.

On the other hand, the government's sheer speculation as to why Abad committed these crimes is explicitly proscribed by established precedent. United States v. Thai, 29 F.3d 785, 819 (2d Cir. 1994); United States v. D'Amato, 39 F.3d 1249, 1256-57 (2d Cir. 1994) ("a conviction based on speculation and surmise can not stand"). Therefore, the conviction on the murder in aid of racketeering count

Additionally, if Abad were concerned with whether DeJesus's attempted kidnapping of him would affect his standing in the alleged enterprise, then he would not have told his alleged co-racketeers about it since none of them were witnesses to, or had any knowledge of, the attempted abduction. That fact confirms that Abad was not concerned with what others thought; he was concerned with one thing and one thing only: revenge. And revenge is not a basis for a murder in aid of racketeering charge under 18 U.S.C. § 1959(a).

Though there unquestionably was evidence that petitioner participated in the murder of Hilario DeJesus, because the motive for that act was personal hatred, the government has failed to prove that Abad committed the crime "for the purpose of gaining entrance to or maintaining or increasing [his] position" in a racketeering enterprise (Bruno, 383 F.3d at 82). Therefore, Abad's conviction for murder in aid of racketeering must be reversed.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

June 20, 2008

Respectfully submitted,

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06-0338-cr
United States v. Abad

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

Argued: November 28, 2007
Decided: January 30, 2008

Docket No. 06-0338-cr

UNITED STATES OF AMERICA,
Appellee,

-v.-

FREDDY ABAD,
Defendant-Appellant.

Before:

JACOBS, *Chief Judge,* B.D. PARKER and WESLEY, *Circuit Judges.*

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York (Daniels, *J.),* on January 18, 2006. We conclude that Abad's claim under the Speedy Trial Act, 18U.S.c. § 3162, is barred by the Act's waiver provision, and not subject to review for plain error under Federal Rule of Criminal

Procedure 52(b). Abad's other claims are without merit.

AFFIRMED.

DAVID M. RODY (Celeste L Koeleveld, Assistant United States Attorney, *of counsel) for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, New York, *for Appellee.*

GERALD J. McMAHON (Joshua F. McMahon, *on the brief),* New York, New York, *for Appellant.*

PER CURIAM:

Defendant-Appellant Freddy Abad appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (Daniels, *J.),* on January 18, 2006. The issues on appeal are – with one exception – controlled by established precedent and are dispensed with briefly below. We write to clarify that Abad's claim under the Speedy Trial Act, 18 U.S.C. § 3162, is barred by the Act's waiver provision, and not subject to review for plain error under Federal Rule of Criminal Procedure 52(b).

BACKGROUND

Abad was convicted of armed robbery and the murder of one Hilario DeJesus, a drug dealer. Abad was the leader of a group of armed robbers who

targeted drug dealers throughout the New York City area, as well as New Jersey, between 1993 and 1996. In the summer of 1996, Abad and a member of his gang, Hector Ortiz, robbed DeJesus at gunpoint. DeJesus retaliated. With the aid of a half dozen other men, Dejesus attempted to kidnap Abad; after Abad was forced into a car, DeJesus threatened to use a "sawing machine" on him. The abduction ended when Abad jumped from the moving vehicle.

On the evening of September 7, 1996, Abad gathered three accomplices (including Ortiz) to rob DeJesus's drug operation. At Abad's direction, they covered their fingertips with Crazy Glue to avoid leaving fingerprints. Abad armed the men with various weapons and carried a machine gun himself.

On the night of the crime, DeJesus was hosting a party for his family. After forcing their way into the apartment at gunpoint, Abad and his gang herded the Dejesus family into the living room. Abad and Ortiz then took Dejesus into the back bedroom, where they tied his hands with a phone cord. The robbers took turns guarding DeJesus, watching the family and searching the apartment for cash and valuables. Eventually, Abad walked into the back bedroom and fired a machine gun into DeJesus's right side. The assailants then fled. Later, Abad bragged that he had shot Dejesus seventeen times.

Abad was captured in North Carolina on April 12, 2002, and first appeared before the District Court on May 9, 2002. His trial began on November 29, 2004. Because his murder of DeJesus made Abad

eligible for the death penalty, the Capital Case Unit of the Department of Justice reviewed the case to decide whether the government would seek the death penalty. In October 2003, it decided not to do so. In January 2004 – nearly nineteen months after Abad's first appearance in court – Hector Ortiz made his first court appearance after his capture by the government. Ortiz likewise faced a possible death penalty requiring Capital Case Unit review; he later pled guilty and was a cooperating witness at Abad's trial.

After a trial, Abad was convicted on five counts: murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951; Hobbs Act robbery, in violation of 18 U.S.C. § 1951; use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c); and use of a firearm to commit murder during a crime of violence, in violation of 18U.S.C. § 924(j).[1]

DISCUSSION

Abad asserts that he was denied a speedy trial, in violation of his rights under the Speedy Trial Act, the speedy trial clause of the Sixth Amendment, the Due Process Clause of the Fifth

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[1] The judgment entered by the District Court incorrectly cited 18 U.S.C.§ 924(i). As the government explains, § 924(i) was a previously mislabeled version of 18 U.S.C. § 924(j). The mislabeled version was evidently cited in the indictment and relied upon by the District Court.

Amendment, and the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Based on his review of the docket sheet, Abad counts 223 elapsed (and allegedly unexcused) days on his speedy trial clock between the date of his initial appearance, May 9, 2002, and the day his trial began, November 29, 2004. The government, on the other hand, counts only three such days on the speedy trial clock. This discrepancy arises because, at several pretrial conferences, the District Court did not record its exclusions of time (made pursuant to the Speedy Trial Act[2]) on the docket sheet. The government has submitted the transcripts of those pretrial conferences to show the District Court's exclusions of time under the Speedy Trial Act.

While the government's position appears correct, it is unnecessary for us to decide the factual issue because Abad failed to file a timely pretrial motion to dismiss the indictment, and therefore waived his claim under the Speedy Trial Act. The Act provides that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. §

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[2] Those exclusions were made in the interests of justice. See 18 U.S.C. § 3161(h)(8)(A). Occasionally, the District Court noted that exclusions in the interests of justice were related to other reasons for delay that are also appropriate considerations under the Speedy Trial Act - *e.g.*, to permit the filing of pretrial motions, see 18U.S.C. § 3161(h)(1)(F), and because of the involvement of a codefendant, see 18U.S.c. § 3161(h)(7).

3162(a)(2). Accordingly, Abad waived his claim under the Speedy Trial Act. *See United States* v. *Patten,* 826 F.2d 198, 199 (2d Cir. 1987) (per curiam) (citing waiver provision of § 3162(a)(2) because defendant "never made a timely motion for relief under the Speedy Trial Act").

The parties dispute, however, whether the waiver provision of § 3162(a)(2) applies or whether we should review Abad's failure to make a timely Speedy Trial Act motion under the "plain error" standard of review of Federal Rule of Criminal Procedure 52(b). The Government advocates waiver, while Abad, relying upon *United States* v. *Sorrentino,* 72 F.3d 294,297 (2d Cir. 1995), argues that his unpreserved speedy trial claim should be reviewed for plain error.

Sorrentino's use of plain error to review a Speedy Trial Act claim, despite the explicit waiver command of § 3162(a)(2), does not appear to have been a deliberate rejection of § 3162(a)(2) by this Court. This is clear from the opinion in *Sorrentino,* which makes no reference to § 3162(a)(2), as well as from the briefs of the parties in that case, which do not cite it.[3] *See* Brief of Appellee United States Gov't

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[3] The Government's argument in *Sorrentino* is all the more perplexing in light of its citation of *United States* v. *Patten,* 826 F.2d 198, 199 (2d Cir. 1987). *See* Brief of Appellee at 13, United States v. Sorrentino, 72 F.3d 294 (2d Cir. 1995) (No. 95-1152). The government's citation of that particular page of *Patten* to support the government's plain error argument in *Sorrentino* is odd in that there is no discussion of plain error review there. In

at 13, United States v. Sorrentino, 72 F.3d 294 (2d Cir. 1995) (No. 95-1152). Moreover, the *Sorrentino* opinion makes no attempt to distinguish our prior analysis of § 3162(a)(2) in *United States* v. *Patten,* 826 F.2d 198, 199 (2d Cir. 1987). Thus, *Sorrentino's* use of the plain error standard appears to have been limited to the arguments presented by the parties and does not control this case. Accordingly, we take this opportunity to clarify that, while unpreserved constitutional claims are subject to review for plain error, unpreserved Speedy Trial Act claims are deemed waived, in accordance with § 3162(a)(2) and *United States* v. *Patten. Sorrentino, to* the extent it suggests otherwise, is hereby overruled.[4]

Abad's constitutional speedy trial claim fairs no better than his waived statutory claim. His constitutional speedy trial claim is governed by the four *Barker* v. *Wingo* factors: "Length of delay, the

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fact, as noted earlier, that page of *Patten* discussed Patten's waiver of his Speedy Trial Act claim under § 3162(a)(2) due to his failure to make a timely motion. *See Patten,* 826 Fold at 199 ("Patten never made a timely motion for relief under the Speedy Trial Act. That Act expressly provides that '[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal' under the Act(.] 18 U.S.C. § 3162(a)(2) (1982); *see, e.g., United States* v. *Balland,* 779 F.2d 287,294 (5th Cir. 1986); *United States* v. *Daly,* 716 F.2d 1499, 1506 & n. 5 (9th Cir. 1983). No such motion was ever made here.").

[4] As is our practice, we circulated this opinion to the active members of this Court before filing. *See United States* v. *Brutus,* 505 F.3d 80, 87 n.5 (2d Cir. 2007).

reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972); *see also Garcia Montalvo* v. *United States*, 862 F.2d 425, 426 (2d Cir. 1988) (per curiam) (applying *Barker's* four-part test). The first of these factors – the length of delay, 31 months – militates in favor of Abad; the others weigh in the government's favor.

As to the second factor, there were a number of valid reasons for the delay, not least of which was the time needed for the Capital Case Unit to decide whether to seek the death penalty against Abad or Hector Ortiz, including time for the defendants to make mitigation submissions to the Department of Justice. The delay was also attributable to the parties' review of discovery materials, the filing of retrial motions (including a successful defense motion to preclude evidence of a prior bad act committed by Abad), and the addition of Ortiz as a defendant in January 2004.

As to the third factor, Abad (through counsel) cited his speedy trial rights at a handful of pretrial conferences. But Abad did so opportunistically, raising his speedy trial right when it suited his interests but not when the delay benefited him. For example, at a pretrial conference on November 7, 2002, Abad expressed his desire for a speedy trial. But little more than a month later, on December 20, 2002, defense counsel consented to an exclusion of time under the Speedy Trial Act until February 14, 2003 in order to submit mitigation materials to the Department of Justice. Judge Daniels asked Abad

directly whether his concern about a speedy trial had been satisfied; Abad responded that it had. Abad pressed his concerns again in early 2004 after Ortiz had joined the case and slowed its progress toward trial. But the same considerations at issue for Abad – a death penalty determination and defense counsel's review of discovery materials – were raised by Ortiz, and the delay was therefore warranted.

Finally, as to the fourth factor, Abad points to no prejudice. Rather, he contends that the delay allowed the government to locate certain "key prosecution witnesses": Ortiz and another cooperating witness, Flora Salas. But this is not the sort of prejudice contemplated by *Barker's* fourth factor. That prejudice is concerned with impediments to the ability of the defense to make its own case *(e.g.,* if defense witnesses are made unavailable due to the government's delay); the opportunity for the prosecution to prepare for trial does not, on its own, amount to prejudice to the defense. *See Barker,* 407 U.S. at 532 (considering, as one of several kinds of possible prejudice to the defense, "the inability of a defendant adequately to prepare his case" that might arise "[i]f witnesses die or disappear during a delay," or "if defense witnesses are unable to recall accurately events of the distant past").

Accordingly, Abad's speedy trial rights under the Sixth Amendment were not violated. His arguments regarding the Fifth and Eighth Amendments are without merit.

II

Abad's remaining arguments-fall short as a result of established precedent.

A.

First, Abad argues that his trial counsel was ineffective because his counsel failed to move to dismiss the indictment on speedy trial grounds, object to the government's "other crimes" evidence, or develop and present a credible defense theory.

This claim is governed by the two-part *Strickland* standard, which requires that a criminal defendant show that his lawyer's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington,* 466 U.S. 668, 688, 694 (1984).

There is no question that Abad fails to satisfy the first prong of *Strickland.* For reasons explained above, Abad's statutory speedy trial claim was waived, and even if it had not been waived, we find greater merit in the government's argument that Abad's statutory speedy trial rights were not violated. Furthermore, as just explained, Abad's constitutional speedy trial rights were not violated. Thus, any defense motion on either a statutory or constitutional basis would have been denied by the District Court. Abad's counsel could not therefore

have been ineffective for failing to make a motion that would have been futile.

Additionally, the evidence of Abad's prior bad acts was admissible as proof that the charged racketeering enterprise existed and that Abad was one of its members. *See United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991) (affirming the admission of "evidence [that] was certainly probative of the existence of the charged enterprise"). It follows that a defense motion to preclude such evidence likewise would have been denied. Lastly, Abad cites snippets of the trial transcript as proof of his trial counsel's ineffectiveness. Having reviewed these aspects of the trial in context, we conclude that Abad's contentions are without merit.

In any event, even assuming that Abad satisfied the first prong of *Strickland*, given the strength of the government's case, Abad cannot show that he was prejudiced by his counsel's performance. The government's case was strong. It included the testimony of four cooperating witnesses, various law enforcement witnesses, and two civilian eyewitnesses to the Dejesus robbery and murder, along with physical evidence collected from the crime scene. And although neither of the eyewitnesses could conclusively identify Abad as the shooter of DeJesus, three cooperating witnesses linked Abad directly to the killing of DeJesus, and also testified that Abad bragged about it afterwards. (One cooperator testified to watching Abad shoot DeJesus numerous times.) Accordingly, even if defense counsel did what Abad argues should have been

done, there is no "reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

B.

Second, Abad argues that the evidence was legally insufficient both to prove that his murder was in aid of racketeering, and that he was the shooter of Hilario DeJesus. "A defendant who challenges his conviction based upon the sufficiency of the evidence bears a heavy burden." *United States v. Griffith*, 284 F.3d 338,348 (2d Cir. 2002). "Not only must the evidence be viewed in the light most favorable to the government and all permissible inferences drawn in its favor, but if the evidence, thus construed, suffices to convince any rational trier of fact of the defendant's guilt beyond a reasonable doubt, . . . [the] conviction must stand." *United States v. Martinez*, 54 F.3d 1040, 1042 (2d Cir. 1995) (internal citations omitted). For reasons mentioned above, the evidence was more than sufficient for *"any* rational trier of fact [to] have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Accordingly, Abad's sufficiency challenge fails.

Finally, Abad filed two briefs *pro se*, raising a number of issues concerning the evidence admitted at trial and his counsel's performance. We have reviewed those claims and find them to be without merit.

CONCLUSION

For the foregoing reasons, the district court's judgment of conviction entered in the United States District Court for the Southern District of New York (Daniels, *J*), on January 18, 2006 is hereby AFFIRMED.

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, NY 10007

Catherine O'Hagan Wolfe *REC'D APR. 2, 2008*
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of March, Two Thousand and Eight,

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United States of America,

Appellee,

v.

Freddy Abad,

Defendant-Appellant.

ORDER
No. 06-0338-cr

Defendant-Appellant Freddy Abad having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/
Frank Perez, Deputy Clerk

United States Court of Appeals
Second Circuit
FILED MAR 24, 2008